The a-historicity of Preah Vihear and the space for inter-disciplinarity in international law

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Of International Law, Semi-colonial Thailand, and Imperial Ghosts is wide-ranging in research, nuanced in analysis, and replete with archival nuggets and food for thought. Prabhakar makes a number of important and interesting contributions in this paper.

First, he convincingly substantiates a practical and theoretical distinction between colonies and semi-colonies. He goes on to demonstrate the continuing relevance of this distinction to the engagement of former colonies and semi-colonies with international law. To this end Prabhakar uses territorial disputes – and specifically the decision of the ICJ in the *Temple of Preah Vihear* case between Cambodia and Thailand – as an example of the relative advantage that former colonies enjoy over former semi-colonies through access to colonial stationery.

Second, he draws attention to the discarding of the colony/semi-colony distinction in the essentially European universalisation of international law. As Prabhakar notes (pg. 71): “One would assume that dissimilar escapades – i.e. semi-colonialism, colonial rule, or any other model in between – in Asia or elsewhere must necessarily lead to plural post-colonialisms…Yet, as the *Temple of Preah Vihear* case explains, the ICJ as the ‘principle judicial organ’ for international law’s universalism paints all histories with a broad European brush.”

Third, and this is the theme that I want to explore further in this brief comment, he highlights the importance of historical contextualisation to the work of international lawyers.

The ‘turn to history’ in international law is, of course, very well recognised and very important. (See, for instance, Janne Nijman explaining the turn to history in international law and Martti Koskenniemi illustrating it.) The turn to history stands, first, for the relevance of the history of international law to international law. But it stands, also, for the relevance of the historical method to the practice of international law.

Anne Orford, in defending anachronism in the study of international legal history, has highlighted the quintessentially historical nature of the legal exercise of engaging with precedent (see, for instance, pg. 172-3). When international lawyers invoke a decision or instrument from the past – whether near or far – their reliance on that decision or instrument must take account of its historical context, and interpret it in that specific context.

This conclusion may seem obvious, but historical contextualisation is problematically absent from international legal discourse. Prabhakar handily demonstrates this, by drawing attention to the *Preah Vihear* majority judgment's a-contextual (and consequently, arguably incorrect) interpretation of historical facts (pgs. 56-6, 64-7). For instance, Prabhakar points to the possibility that the Siamese rulers did not appreciate the context and consequences of the 'treaty' relied on by the ICJ in its findings in favour of Cambodia. Similarly, he notes that while maps were a form of territorial delimitation for France, for Siam they were a visual representation of political authority, rather than a precise demarcation of territory. These miscommunications, arising from the clash between 'oriental' and 'occidental' ideas, find no significance in the modern doctrines of international law. These doctrines allow limited scope to the concept of duress, and do not allow for the possibility that maps may have more than one signification. Their nuanced application to the particular historical context of the *Preah Vihear* dispute would have required the ICJ to engage in a contextual historical interpretation. It is this failure that Prabhakar's paper so clearly highlights.

Consequently, Prabhakar's paper is much more than a theoretical call for the recognition of the *sui generis* status of semi-colonies in international law. It is a critique of the *Preah Vihear* decision on the grounds that it does not contextually interpret the relevant historical facts. And in that sense it is a critique of international law generally, which has strait-jacketed the *Preah Vihear* decision as a leading case on estoppel in international law (pg. 70), notwithstanding the questionable interpretation of the conduct which was found to bind Thailand.

The relevance of historical facts and methods to the task of the international lawyer is self-evident, if not obvious. Insights from other disciplines, while perhaps less obviously relevant, are just as relevant in practice.

Some applications of inter-disciplinary insights are readily apparent. For instance, economic analyses may play a role in the drafting and interpretation of economic laws; social facts may shape laws intended to encourage or discourage particular social phenomena; geographical facts will undoubtedly be relevant to delimitation exercises.

Other applications are less apparent, but just as important. For instance, interpretive debates may be usefully understood, and perhaps even resolved, as clashes of interpretive or epistemic communities. Acknowledging the anthropocentric limitations of criminal law is a necessary precursor to its extension to artificial intelligence. Understanding the historical and political origins of the need for extraordinary protection of foreign investment can influence the adjudication of investor-state disputes. The extensive literature on militarised vision and drone theory can introduce critical insights into the law and practice of targeting in armed conflict.

To be clear, I am not suggesting that these inter-disciplinary analyses are entirely absent from the discourse of international law. Indeed, international law scholarship from critical, third world, feminist, Marxist, literary and economy perspectives frequently draws on such insights. By way of example, see Michael Waibel (Chapter

7), Christiane Wilke (Chapter 12), and a recent issue of the Australian Feminist Law Journal.

Arguably, however, there is space for far greater integration of inter-disciplinary insights into mainstream scholarship. And there is a need to question settled canons of international law from the perspective of these inter-disciplinary insights – as Prabhakar has done – to determine whether they demand re-evaluation.

Notwithstanding the utility and importance of inter-disciplinary insights, the law in general seems to fare very poorly in its engagement with these insights.

I have previously argued that parts of the SCM Agreement of the WTO seem to ignore the explicitly economic rationale of that instrument. Surabhi Ranganathan has argued that law of the sea limits on the continental shelf ignore geographical facts. Notwithstanding the increasing recognition that investment treaties do not actually promote foreign investment, investment arbitration jurisprudence is replete with expansive interpretations of treaty rights based on preambular references to investment-promotion.

I would suggest that these are not isolated examples, but evidence of a systemic inability to engage with other disciplines. Substantiating that intuition, unfortunately, is beyond the scope of this short piece.

Building on Prabhakar's arguments, in this post I have emphasised the utility of inter-disciplinary analyses to the practice of international law, and have noted the seeming failure of the law in engaging with facts from other disciplines. I must apologise for the summary form of these arguments, and for their reliance on inductive reasoning. Neither of these shortcomings will, I hope, prevent engagement with the principled implications of these arguments.

In concluding, I would like to thank the editors of the Völkerrechtsblog for the opportunity to contribute to this symposium.

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